

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-217351 **DATE:** July 26, 1985
MATTER OF: Okaw Industries, Inc.

DIGEST:

Protest against prime contractor's award of subcontract is dismissed since it does not meet any of the circumstances under which GAO considered protests of subcontract awards under the Bid Protest Procedures then in effect.

Okaw Industries, Inc. (Okaw) protests the rejection of its offer in response to request for proposals No. NEXRAD 040984-3, issued by Raytheon-Wayland, Inc. (Raytheon) under Raytheon's prime contract No. NA-83-SAC-00619 with the National Oceanic and Atmospheric Administration (NOAA). The solicitation invited proposals to procure radomes, a component of the "Next Generation Weather Radar" (NEXRAD) system which will provide weather information to three major federal agencies.

We dismiss the protest.

Under our Bid Protest Procedures, 4 C.F.R. Part 21 (1984), in effect when this protest was filed, we considered subcontractor protests only in the limited circumstances set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166. Okaw contends that two of those circumstances are applicable here, as follows:

- (1) the government's active or direct participation in the selection of the subcontractor has the net effect of causing the rejection or selection of a potential subcontractor, or of significantly limiting subcontractor sources; and
- (2) the prime contractor is acting as a purchasing agent of the government.

The NEXRAD Program involves the Departments of Commerce, Defense, and Transportation. After these Departments stated a common need for information concerning

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the location, intensity, and movement of hazardous weather activity, the Office of Management and Budget approved the establishment of a Joint Program Office within NOAA to plan, define, acquire and deploy a NEXRAD network. In May 1983, NOAA awarded competitive contracts to Raytheon and Sperry Corporation to produce a preproduction model of a NEXRAD system consisting of three major modules: radar acquisitions, computer processing, and user interface.

It was the prime contractor's responsibility to decide whether to produce each module and its components either by subcontracting to other firms or by in-house development. Further, each prime contract provided that the contractor could enter into subcontracts without the consent of the contracting officer after the contracting officer had approved the contractor's procurement system. Raytheon gained such approval before awarding the subject subcontract, and pursuant to the approved system Raytheon conducted a competitively negotiated procurement for the required items. According to the record, the specification used by Raytheon was not subject to prior government approval. In addition, no government representative participated in any evaluation or negotiation session.

Okaw alleges that it submitted the lowest priced offer, but was removed from the competition because Raytheon preferred a specific design and therefore claimed that Okaw's design did not meet the requirements of the specification. Okaw contends that Raytheon's actions were unfair and taken in bad faith, and states that it should have been given an opportunity to provide Raytheon with an offer for the allegedly preferred design.

At the outset, we note that alleged bad faith by the prime contractor independent of government involvement provides no basis for our review. Ecological Research Services, Inc., B-209358, Apr. 22, 1983, 83-1 CPD ¶ 442. Okaw must prevail, therefore, in its argument that the government actively and directly participated in Okaw's rejection. According to Okaw, it called the government's NEXRAD Program Manager to discuss the rejection of its proposal, and the Program Manager had such familiarity with the reasons for rejecting Okaw's proposal and used the pronoun "we" when discussing the matter as to indicate that the government actively participated in Okaw's rejection. NOAA, however, denies that the Program Manager had any involvement in the rejection of the proposal, and states

that its only direct participation in the procurement was the approval of Raytheon's procurement system.

There is no direct evidence of government involvement in the rejection of Okaw's proposal. That the Program Manager may have been aware of the prime contractor's decision to reject the proposal is not unusual given the contractual relationship between Raytheon and the government. The Program Manager's alleged use of the term "we" in conjunction with the decision reasonably indicates only a recognition of the contractual relationship between the parties. We therefore believe that the protester, which has the burden of presenting sufficient evidence to establish its position, has failed to meet its burden here. See Spectrum Leasing Corp., B-213647.3, Sept. 10, 1984, 84-2 CPD ¶ 267.

Okaw also contends that Raytheon is acting as a purchasing agent of the government. Okaw's allegation, however, is not supported by the record. We have held that a prime contractor acts as a purchasing agent for the government only where the prime contractor is operating and/or managing a government-owned facility under a cost reimbursement contract, or is specifically authorized to act as the government's agent and the legal effect of the contractor's action is binding on the government. See Information Consultants, Inc., B-213682, Apr. 2, 1984, 84-1 CPD ¶ 373; Ecological Research Services, Inc., supra. Raytheon is not an operating or managing contractor, and the contract between Raytheon and the government does not authorize Raytheon to act as the government's agent; the legal effect of the subcontract was to bind Raytheon, not the government. Thus, the purchasing agent exception also is not applicable.

The protest is dismissed.



Ronald Berger
Deputy Associate
General Counsel